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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996	)	CC Docket No. 97-11
	)	

COMMENTS OF BELLSOUTH

BELLSOUTH CORPORATION and
BELLSOUTH TELECOMMUNICATIONS, INC

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SUMMARY

BellSouth applauds the Commission for its desire to reduce or eliminate unnecessary regulation, and to apply the forbearance authority granted to it by the 1996 Act to achieve that goal. Application of Section 214 of the Communications Act of 1934 to domestic common carriers no longer serves the public interest. The Commission can read Section 402(b)(2)(A) more broadly than proposed in the NPRM and still be consistent with the intent of Congress. For the reasons stated in the text, BellSouth recommends that the Commission treat any augmentation of lines in a carrier's domestic network as an "extension of any line", and therefore exempt from Section 214 authorizations.

If the Commission adopts BellSouth's proposed definition of "extensions of any line", the application of Section 402(b)(2)(A) can be expanded, the scope of the Commission's forbearance under Section 401 of the 1996 Act can be narrowed, and the Commission will better implement the intent of Congress.

BellSouth believes that the Commission should eliminate the Section 214 requirements for the addition of domestic facilities by all carriers, and should streamline the filings required to discontinue service. The Commission also should eliminate the continuing authority report and the semiannual temporary/emergency service report currently required by its Rules. The Commission should retain the recently streamlined rules governing international Section 214 authorizations.

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On January 13, 1997, the Commission released a Notice of Proposed Rulemaking ("NPRM") to implement Section 402(b)(2)(A) of the Telecommunications Act of 1996, which narrowed the scope of Section 214 of the Communications Act of 1934. For the reasons set forth below, BellSouth believes that the Commission should eliminate the Section 214 requirements for the addition of domestic facilities by all carriers, and should streamline the filings required to discontinue service. The Commission also should eliminate the continuing authority report and the semiannual temporary/emergency service report currently required by its Rules. The Commission should retain the recently streamlined rules governing international Section 214 authorizations.

I. Overview.

As the Commission recognizes in the NPRM, Section 214 of the Communications Act of 1934 was included by Congress to prevent useless duplication of facilities that could increase charges to telephone ratepayers.[1] Although Congress adopted Section 214 to address this concern, the Commission's only comprehensive investigation into this issue

[1] NPRM, ¶1, ¶9 and fn 14. MCI Telecommunications Corp. v. F.C.C., 561 F.2d 365, 375 (D.C. Cir. 1977)("Execunet I").

failed to document any such conduct. As the Commission stated in adopting price cap regulation:

> This inquiry in the late 1930s cost millions of dollars and occupied approximately 300 researchers for several years. The staff's efforts culminated in the preparation of a voluminous report on Bell System costs and operations, but allegations of inflated costs and rates -- and substantial cost shifting between unregulated Western Electric and regulated telephone company operations -- were never documented to the Commission's satisfaction. Ultimately, no action was taken on the report's major recommendations, and the investigation produced no significant changes in Commission or Bell System procedures.[2]

Thus, there is no basis to assume that Section 214 is needed to protect ratepayers against higher charges due to rate base "padding".

Section 214 has also been used by the Commission as an instrument of policy. The authority of the Commission to attach conditions to a Section 214 grant has been used to influence carrier conduct.[3] But the use of facilities to provide any services they are capable of providing may be conditioned under Section 214(c) only after an express finding that the public interest requires such restrictions, and only if such restrictions are embodied in the original instrument of authorization.[4] Following the Court's decision in

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[2] In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 2885 (1989), citing FCC, Investigation of the Telephone Industry in the United States (1939)("Walker Report").

[3] See, e.g., Western Union Telegraph Company v. FCC, 541 F.2d 346 (3rd Cir. 1976)(conditioning grant of Section 214 authorization on a waiver by a carrier of contractual rights.); Atlantic Tele-Network, Inc. v. FCC, 59 F.3d 1384 (D.C. Cir. 1995)(conditioning grant of Section 214 authorization on carrier's acceptance of "proportionate return" policy.). But see, Hawaiian Telephone Company v. FCC, 498 F.2d 771 (D.C. Cir. 1974)(FCC erred in granting Section 214 authorization where sole public interest finding was that grant would promote competition.)

[4] Execunet I, 561 F.2d at 375-377.

Execunet I, the Commission's primary means of implementing policy shifted from the Section 214 authorization process to the Section 204 tariff review process

As an instrument of policy, Section 214 has significant disadvantages. The Commission has recognized that the requirement to file Section 214 applications results in delays in providing service to the public; imposes costs on consumers, carriers, and the Commission; impairs planning, construction and initiation of service; delays revenues, and handicaps carriers in competition with non-carriers.[5] For these reasons, the Commission has sought to minimize the impact of Section 214 on affected carriers through a variety of means, such as "blanket" authorizations and forbearance from Section 214 requirements for "non-dominant" carriers.

In the 1996 Act, Congress adopted a "pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[6] In addition to amending specific sections of the Communications Act to accomplish this goal, Congress included Title IV - Regulatory Reform. In that Title, Congress clearly expressed its intent that the forces of competition be substituted for regulation as quickly as the public interest will permit. In mandatory language, Congress instructed that the Commission "shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier

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[5] In the Matter of Blanket Section 214 Authorization for the Provision by a Telephone Common Carrier of lines for its Cable Television and other Non-Common carrier Services Outside its Telephone Service Area, Notice of Proposed Rulemaking, 96 F.C.C. 2d 623, 624 (1984).

[6] See Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1(1996)(Joint Explanatory Statement).

or telecommunications service" unless such provision or regulation is "necessary to ensure that the charges, practices, classifications, or regulations" of the carrier "are just and reasonable and are not unjustly or unreasonably discriminatory", is necessary to protect consumers, and if such forbearance is consistent with the public interest.[7] In addition, Congress instructed the Commission to provide carriers with "Regulatory Relief."[8] Included in the regulatory relief was Section 402(b)(2)(A), which requires:

> The Commission shall permit any common carrier --
> (A) to be exempt from the requirement of Section 214 of the Communications Act of 1934 for the extension of any line,

In the NPRM, the Commission reads this language very narrowly. Because Section 402(b)(2)(A) exempts common carriers from the requirements of Section 214 "for the extension of any line" without mentioning "new" lines, the NPRM seeks comment on how the Commission should distinguish between "new" lines and "extensions" of lines. The NPRM concedes that no such distinction has been drawn in the past by the Commission or the courts.[9] It infers, however, that Congress intended that the Commission draw such a distinction now. It is just as logical to assume that Congress was aware that the Commission and the Courts treated "new" lines and "extensions" of lines indistinguishably, and intended that the Commission continue to do so.

In drawing a distinction between "new" lines and "extensions of lines", the NPRM cites the language of the Conference Report rather than the language of the statute itself.[10] Whereas the Conference Report refers to "extensions of lines", the statute exempts "the

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[7] 1996 Act, Section 401.
[8] 1996 Act, Section 402.
[9] NPRM, ¶ 5.
[10] NPRM, ¶ 9

extension of any line." If the Commission gives full meaning to the word "any" in Section 402(b)(2)(A), it cannot draw the geographical distinction apparently proposed in paragraph 21 of the NPRM. Lines used to reach new customers "in region" are within the ambit of "any lines", just as are lines used to extend service to new geographic locations.

The test apparently proposed in the NPRM is as impractical as it is forced. For example, if BellSouth "extends" a line from Louisville, KY to Cincinnati, OH to serve a large customer, the Commission would treat that line as an "extension" under the definition proposed in the NPRM, and therefore exempt from Section 214. However, if BellSouth then added facilities to reach other customers in Cincinnati, the Commission would treat these as "new" lines subject to a Section 214 filing requirement.[11] BellSouth respectfully submits that both the first line to Cincinnati, and the subsequent lines to serve additional customers in that city, are within the ambit of "extensions of any line" under Section 402(b)(2)(A), and hence are exempt from the Section 214 filing requirement.[12]

It is possible that the Commission intended a different distinction between extensions of lines and new lines in Paragraph 21 of the NPRM. If the Commission intends the words "projects that increase the capabilities of a carrier's existing network within the area it already serves" to include technological upgrades to existing lines to expand their capacity or introduce new capabilities, such "projects" do not require a new Section 214 certification. Section 214 does not require prior approval of "projects", but only of new lines and extensions of lines. In Execunet I, the Court made it clear that once

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[11] NPRM, ¶ 27.

[12] As a practical matter, most lines used to fill out a carrier's service capability in a given geographic location will be exempt from Section 214 under the proviso in Section 214(a)(2) that exempts "local, branch, or terminal lines not exceeding ten miles in length."

lines are authorized and constructed, the Commission cannot restrict the offering of additional services or capabilities over such lines.[13] In BellSouth's view, the same rationale would preclude the Commission from requiring additional certification for a carrier to derive "additional channels of communications" over existing facilities.[14]

Alternately, the NPRM seeks comment on whether, consistent with the Surface Transportation Board's treatment of "double-tracking" of rail lines, the Commission should treat in-region increases in network capacity as "improvements", outside the scope of Section 214.[15] The Commission is clearly authorized by Section 214 itself to adopt this approach. Section 214(a) provides

> That the Commission may, upon appropriate request being made, authorize . . . the supplementing of existing facilities, without regard to the provisions of this section.

The Commission can and should declare that any upgrading of network facilities by a domestic carrier is authorized under this provision, and therefore no Section 214 approval is required for such upgrades.

As shown above, the Commission's proposed distinction between "new" lines and "extensions of lines" based on the geographic scope of the carrier's existing network, or the technical capability of that network, does not give full effect to the Congressional mandate in Section 402(b)(2)(A) that carriers are exempt from the requirements of Section 214 "for the extension of any line." In Paragraph 35 of the NPRM, the

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[13] The Court held that the Commission could not limit MCI to providing private line services over its facilities, even though the offering of switched services clearly involved the addition of switching equipment to MCI's network.

[14] NPRM, ¶ 21.

[15] NPRM, ¶ 22.

Commission presents four alternate definitions of "extension of any line." BellSouth believes that proposed definition (ii) is most compatible with the statutory requirement of Section 402(b)(2)(A). Under that definition, any "augmentation" of a carrier's network would be considered exempt from Section 214 requirements, without regard for the geographic scope or technical capability of the carrier's existing network. Therefore, BellSouth urges the Commission to adopt definition (ii) from Paragraph 35 to implement Section 402(b)(2)(A) of the 1996 Act.

II. Section 214 Requirements for Price Cap Carriers, Average Schedule Carriers and Domestic, Non-dominant Carriers.

If the Commission adopts the definition of "extension of any line" proposed by BellSouth above, the Commission will have less need to rely on forbearance to implement the 1996 Act. For domestic carriers, only a "new" line unconnected with the carrier's existing network would remain within the scope of Section 214. For those rare remaining cases, BellSouth agrees with the tentative conclusion in the NPRM that the Commission should forbear from exercising any Section 214 regulation for price cap carriers, average schedule companies and domestic, non-dominant carriers. Such forbearance would recognize the realities of the current telecommunications marketplace. Whatever validity the fears of rate base "padding" may have had in the past, with the implementation of the 1996 Act, no carrier is going to invest in long-lived facilities in the hope that the regulatory process will allow that carrier to charge above-market rates over the life of that facility. This is certainly true for price cap carriers such as BellSouth. BellSouth operates under price cap regulation in the interstate jurisdiction and in each of its nine state jurisdictions. Such regulation provides the carrier with an unequivocal incentive to match investment decisions to market demand for the services to be provided over its facilities. Rather than fearing "gold-plating" by price cap carriers, customers of such carriers have expressed fears that carriers will under invest in order to achieve higher short term earnings. There is simply no role for the Section 214 approval process in a price cap regulatory environment.

The fact that price cap regulation may not sever all links between prices and regulated earnings should not affect the Commission's decision to forbear. First, the theory that rate of return regulation provides carriers with an incentive to over-invest has not been proved. Second, even if such incentive did exist, there is no evidence that carriers acted in accordance with that incentive.[16] The Walker Report cited above, despite the massive effort put forth by the Commission, did not establish that carriers "pad" their rate base even under rate of return regulation. Under price caps, even a carrier with a sharing obligation and facing the possibility of future recalibration would be foolish to over invest in long-lived assets in the hope of achieving a marginal short-term benefit. The Commission can comfortably disregard any such speculative concerns and forbear from applying Section 214 to all price cap carriers. BellSouth concurs with the forbearance analysis contained at Paragraphs 44-48 of the NPRM.

The NPRM also seeks comment on whether the Commission should modify its current streamlined procedures for the processing of international authorizations.[17] The Commission recently concluded a comprehensive review of the Section 214 process and

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[16] There are counter-incentives, such as "regulatory lag" and the ability of regulators to disallow "imprudent" investment, that make it problematical that any carrier would deliberately over-invest in order to inflate the rate base.
[17] NPRM, ¶ 33

regulatory procedures for international service providers.[18] The Commission adopted new regulations which it determined would further its "mandate under the recent Telecommunications Act of 1996 ("Telecom Act") to eliminate unnecessary government regulation of the telecommunications industry."[19] In BellSouth's experience, this streamlined regulatory approach is working well. BellSouth believes that the existing international authorization process does not need to be modified to satisfy the Commission's expressed desire to "reduce or eliminate unnecessary regulations and thereby increase competition in the marketplace."[20]

III. Section 214 Requirements for Domestic, Dominant, Rate-of-Return Carriers.

BellSouth believes that the Commission can safely forbear from applying Section 214 requirements to domestic, dominant rate-of-return carriers. The scope of such carriers' operations that will remain subject to Section 214 is very limited, even under the Commission's proposed definition of "new" lines and "extensions of lines". If the Commission adopts BellSouth's proposed definition, there would be little or nothing in these carriers' operations that would be subject to Section 214. Under either definition, however, the disadvantages of Section 214 regulation, recognized by the Commission and cited by BellSouth in part I of these comments, would greatly outweigh any perceived benefit from continued application of Section 214 to this subset of carriers.

If the Commission determines that it must continue to apply Section 214 to such carriers to protect the public interest, the Commission should streamline the filing

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[18] In the Matter of Streamlining the International Section 214 Authorization Process and Tariff Requirements, 11 FCC Rcd 12884 (1996).
[19] Id., 11 FCC Rcd at 12885-6.
[20] Id.

requirements and approval process as proposed in the NPRM.[21] BellSouth also supports the adoption of blanket authorization for small projects if the Commission decides not to forbear from applying Section 214 to these carriers.[22]

IV. Reporting Requirements.

BellSouth fully concurs with the NPRM's tentative decision to eliminate the reports required by Sections 63.03 and 63.04 of the Commission's rules. The cost of preparing these reports significantly outweigh their value to the Commission and the public. As noted in the NPRM, the Commission has ample authority to obtain information from the carriers about specific projects, should a regulatory need to do so arise.[23]

V. Section 214 Discontinuance Requirements

In the NPRM, the Commission correctly notes that the 1996 Act did not alter the Commission's authority with respect to discontinuance of service by a carrier. BellSouth concurs with the Commission's discussion of the pros and cons of modifying the discontinuance requirements. The Commission must weigh the risk to a carrier if there are extensive requirements that must be met prior to the discontinuance of service against the risk to the public if their chosen carrier suddenly ceases to provide service. BellSouth concurs with the Commission's tentative conclusion that the streamlined procedures contained in Section 63.71 of the Rules strike a reasonable balance between protecting consumers and reducing unnecessary barriers to exit for all carriers, whether dominant or

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[21] NPRM, ¶¶ 52-58.
[22] NPRM, ¶¶ 59-62.
[23] NPRM, ¶ 67.

non-dominant.[24] BellSouth does not object to the 60 day advance notice requirement for dominant, domestic carriers proposed in Paragraph 71 of the NPRM.

VI. Technical Amendments to 47 C.F.R. Part 63.

As discussed above, BellSouth disagrees with the distinction between "new" lines and "extensions of any line" proposed in the NPRM. Therefore, BellSouth believes that Section 63.01(a) should be amended to read as follows:

> (a) Any common carrier proposing to undertake the extension of any line is exempt from the requirements of Section 214 of the Communications Act of 1934, as amended. For the purpose of this section, an *extension of any line* shall mean "any augmentation of lines in a carriers' domestic network, heretofore subject to Section 214 certification, without distinguishing 'new' lines from 'extensions'." This section does not relieve any common carrier from the obligation to obtain all necessary authorizations from the Commission for the use of radio frequencies.

If the Commission adopts its proposed treatment of domestic, dominant rate of return carriers, the proposed Section 63.03 is appropriate. If, as BellSouth suggests, the Commission applies forbearance to those carriers, forbearance for all carriers would apply, and the Commission could eliminate the definitions in proposed Section 63.02(a) and redesignate Section 63.02(b) as simply Section 63.02, to read as follows:

> Any common carrier that is proposing to construct, acquire, or operate a new line, or engage in transmission over or by means of such line, and such line originates and terminates in the United States, is not required to file for authority pursuant to Section 214 of the Communications Act of 1934, as amended. This section does not relieve any common carrier from the obligation to obtain all necessary authorizations from the Commission for use of radio frequencies.

BellSouth concurs with the other technical amendments proposed in Appendix A to the NPRM.

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[24] NPRM, ¶ 70.

VII. Conclusion.

The Commission can go further to implement the intent of the 1996 Act than proposed in the NPRM. The Commission should eliminate the Section 214 facilities authorizations for all domestic carriers, streamline the filings required to discontinue service, eliminate unnecessary reporting requirements, and retain the recently streamlined rules governing international Section 214 authorizations. These measures will promote the Congressional goals of eliminating unnecessary regulation, encouraging infrastructure investment and promoting competition.

Respectfully submitted,

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